

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

STEVEN E. SCHMIDT,	)	CASE NO. C05-405-MJP-MAT
	)	
Plaintiff,	)	
	)	
v.	)	REPORT AND RECOMMENDATION
	)	RE: SOCIAL SECURITY
JO ANNE B. BARNHART, Commissioner	)	DISABILITY APPEAL
of Social Security,	)	
	)	
Defendant.	)	
	)	

Plaintiff Steven E. Schmidt proceeds through counsel in his appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's application for Supplemental Security Income (SSI) and Disability Insurance (DI) benefits after a hearing before an Administrative Law Judge (ALJ).

Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, it is recommended that this matter be REMANDED for further administrative proceedings.

**FACTS AND PROCEDURAL HISTORY**

Plaintiff was born on XXXX, 1963.<sup>1</sup> He completed high school and has worked as a lawn

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<sup>1</sup> Plaintiff's date of birth is redacted back to the year of birth in accordance with the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

01 maintenance worker, day laborer, and lineman for a cable company.

02 Plaintiff filed an application for DI and SSI benefits in October 2001, alleging a disability  
03 onset date of April 21, 2001 due to rib injuries and anxiety. Plaintiff's application was denied  
04 initially and on reconsideration, and he timely requested a hearing.

05 ALJ John F. Bauer held a hearing on February 24, 2004. (AR 352-92.) The ALJ heard  
06 testimony from plaintiff, medical expert Richard Johnson, M.D., and vocational expert Robert  
07 Fraser. On May 24, 2004, ALJ Bauer issued a decision denying plaintiff's application for SSI and  
08 DI benefits. (AR 16-23.)

09 Plaintiff appealed the ALJ's decision to the Appeals Council, which declined to review  
10 plaintiff's claim. (AR 5-7.) Plaintiff appealed this final decision of the Commissioner to this  
11 Court.

## 12 JURISDICTION

13 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

## 14 DISCUSSION

15 The Commissioner follows a five-step sequential evaluation process for determining  
16 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must  
17 be determined whether the claimant is gainfully employed. The ALJ found plaintiff had not  
18 engaged in substantial gainful activity since April 21, 2001. At step two, it must be determined  
19 whether a claimant suffers from a severe impairment. The ALJ found severe plaintiff's residuals  
20 from a stabbing to his back, post-traumatic stress disorder (PTSD), and substance addiction  
21 disorder. Step three asks whether a claimant's impairments meet or equal a listed impairment.  
22 The ALJ found plaintiff's substance addiction disorder to meet the criteria of listing 12.09, but  
23 concluded that, absent substance abuse, plaintiff's substance addiction impairment did not meet  
24 or equal any listing.<sup>2</sup> If a claimant's impairments do not meet or equal a listing, the Commissioner

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26 <sup>2</sup> An individual is not considered to be disabled if alcoholism or drug addiction would be  
a contributing factor material to a determination that the individual is disabled. 42 U.S.C. §§

01 must assess residual functional capacity (RFC) and determine at step four whether the claimant  
02 has demonstrated an inability to perform past relevant work. The ALJ found that plaintiff could  
03 not perform his past relevant work. If a claimant demonstrates an inability to perform past  
04 relevant work, the burden shifts to the Commissioner to demonstrate at step five that the claimant  
05 retains the capacity to make an adjustment to work that exists in significant levels in the national  
06 economy. The ALJ found that, absent substance abuse, plaintiff could perform light work  
07 involving simple, routine tasks, and limited contact with the public and co-workers, including work  
08 as a janitor.

09 This Court's review of the ALJ's decision is limited to whether the decision is in  
10 accordance with the law and the findings supported by substantial evidence in the record as a  
11 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more  
12 than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable  
13 mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750  
14 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's  
15 decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.  
16 2002).

17 In this case, plaintiff argues that the ALJ erred in failing to provide any reason for  
18 disregarding the opinions of his treating physician, Christine Yuodelis-Flores, M.D., and in  
19 ignoring the statements from other sources, including Keith Johannes, MSW, Duane Darlington,  
20 MHP, and Erma McNare, plaintiff's girlfriend. Plaintiff further argues that the ALJ erred in  
21 rejecting his testimony, in determining his RFC, and in failing to give a complete hypothetical to  
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23 423(d)(2)(C), 1382c(a)(3)(J). Implementing regulations specify that alcoholism or drug addiction  
24 is a contributing factor material to a disability determination if an individual would not be disabled  
25 if he stopped using alcohol or drugs. *See* 20 C.F.R. §§ 404.1535(b), 416.925(b). As with each  
26 of the first four steps of the disability evaluation process, the claimant bears the burden of showing  
that his or her drug or alcohol addiction is not a contributing factor material to his or her disability.  
*Ball v. Massanari*, 254 F.3d 817, 821 (9th Cir. 2001).

01 the vocational expert. He requests remand for an award of benefits or, alternatively, for further  
02 administrative proceedings. The Commissioner asserts that the ALJ's decision is supported by  
03 substantial evidence and should be affirmed. For the reasons described below, the undersigned  
04 concludes that this matter should be remanded for further administrative proceedings.

05 Treating Physician's Opinions

06 In general, more weight should be given to the opinion of a treating physician than to a  
07 non-treating physician, and more weight to the opinion of an examining physician than to a non-  
08 examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Where not contradicted  
09 by another physician, a treating or examining physician's opinion may be rejected only for "clear  
10 and convincing" reasons. *Id.* (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991)).  
11 Where contradicted, a treating or examining physician's opinion may not be rejected without  
12 "specific and legitimate reasons' supported by substantial evidence in the record for so doing."  
13 *Id.* at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)). *See also Smolen*  
14 *v. Chater*, 80 F.3d 1273, 1285 (9th Cir. 1996) (opinions of specialists given more weight than  
15 non-specialists). Where the opinion of the treating physician is contradicted, and the non-treating  
16 physician's opinion is based on independent clinical findings that differ from those of the treating  
17 physician, the opinion of the non-treating physician may itself constitute substantial evidence. *See*  
18 *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995). It is the sole province of the ALJ to  
19 resolve this conflict. *Id.*

20 In this case, plaintiff argues that the ALJ improperly rejected the opinions of treating  
21 physician Dr. Yuodelis-Flores. Dr. Yuodelis-Flores completed psychiatric evaluations of plaintiff  
22 on July 23, 2001 and October 11, 2001. (AR 179-82, 300-03.) In the July 2001 evaluation, Dr.  
23 Yuodelis-Flores diagnosed plaintiff with PTSD following his being stabbed some six months prior.  
24 (AR 300-01.) She later diagnosed plaintiff with cannabis and alcohol abuse, in addition to PTSD.  
25 (AR 180.) In both evaluations, Dr. Yuodelis-Flores found severe and marked limitations. (AR  
26 181, 302.) Plaintiff asserts that the ALJ failed to provide any reasons for disregarding the opinions

01 of Dr. Yuodelis-Flores and, in fact, does not mention either Dr. Yuodelis-Flores or her findings  
02 in the decision.

03 The Commissioner contends that the ALJ accepted the opinions of Dr. Yuodelis-Flores.  
04 She notes several citations to Dr. Yuodelis-Flores' opinions in support of the ALJ's finding that  
05 plaintiff's functional limitations were exacerbated by substance abuse. (*See* AR 18-19.) In this  
06 respect, plaintiff argues that the Commissioner distorts and misrepresents the opinions of Dr.  
07 Yuodelis-Flores. She notes evidence that Dr. Yuodelis-Flores did not find plaintiff limited only  
08 with regard to his substance abuse.

09 As indicated by plaintiff, the ALJ's decision does not mention Dr. Yuodelis-Flores by  
10 name. Nor does it mention the various limitations identified by this treating physician. On the  
11 other hand, the Commissioner accurately notes citation to Dr. Yuodelis-Flores' October 2001  
12 evaluation in support of plaintiff's PTSD diagnosis, as well as citation to notes from Dr. Yuodelis-  
13 Flores:

14 The record includes a diagnosis of [PTSD] related to the stabbing (Ex. 2F). He  
15 initially reported nightmares, hypervigilance, anxiety, depression and fear of assailants  
16 and strangers. The record shows that the claimant was started on medication therapy  
17 with some improvement. However, several times the claimant failed to follow-  
through with treatment, medication and appointments. During this time he continued  
his substance abuse (Exs. 3F-4F.)

18 During this period of time, the claimant was seen at Harborview after getting into a  
19 fight in October 2001 (Ex. 4F, p. 6). He had been drinking and admitted use of  
marijuana. He did not see either as a problem and refused consideration of a  
treatment program.

20 By January 2002, the claimant was sleeping outside in the university district. He was  
21 using marijuana and alcohol and had recently had his medications "stolen". He  
complained of increased irritability and depression (*Id.*, p. 5.)

22 Around this time, the claimant was arrested for domestic violence. (*Id.*, p. 2). It  
23 appears the claimant also violated a no-contact order. The claimant testified that he  
was incarcerated for ten months beginning February 2002.

24 The claimant sought mental health treatment in April 2003 after his incarceration (Ex.  
25 13F). He complained of depression and began treatment. As reported by the claimant  
at the hearing, he continued to drink and smoke marijuana during this time.

26 The record provides that the claimant eventually underwent a substance abuse

01 treatment starting in approximately September 2003 (See, Ex. 14F, p. 5 re 6-months  
02 sober). This agrees with the claimant's testimony. The treatment notes reflect  
03 improvement in his mood with symptoms of anxiety and continuation of medication  
and abstinence from substance abuse. (Exs. 14F-16F).

04 (AR 18 (Exhibit 2F (AR 179-82) refers to the October 2001 evaluation from Dr. Yuodelis-Flores  
05 and Exhibit 4F (AR 222-37) refers to treatment notes from Dr. Yuodelis-Flores dated September  
06 2000 through April 2002.)) The ALJ thereafter found plaintiff met the listing for substance  
07 addiction disorder, with several marked limitations, but that, following his remission, did not  
08 experience PTSD-related problems at the listing level and had only slight to moderate limitations.  
09 (AR 19.)

10 In her July 2001 evaluation, Dr. Yuodelis-Flores indicated that it was "unknown" whether  
11 alcohol and drug treatment would be likely to decrease the severity of plaintiff's condition, and  
12 "unknown" as to the likely effect of sixty days of abstinence. (AR 301.) She noted that "[a]lcohol  
13 withdrawal would worsen anxiety" and that cognitive limitations, including a severe limitation in  
14 plaintiff's ability to perform routine tasks, were *not* mostly likely the result of alcohol abuse. (AR  
15 302.) However, Dr. Yuodelis-Flores also then estimated plaintiff's limitations to last for a  
16 maximum of six months. (AR 303.) *See* 20 C.F.R. § 404.1509 ("Unless your impairment is  
17 expected to result in death, it must have lasted or must be expected to last for a continuous period  
18 of at least 12 months.")

19 In her October 2001 evaluation, Dr. Yuodelis-Flores stated that plaintiff's "PTSD is  
20 independent of substance abuse," that alcohol or drug treatment would be likely to decrease the  
21 severity of plaintiff's condition, that the effect of sixty days of abstinence would be "unknown,  
22 probably improvement," and that alcohol or drug abuse "worsens depression/anxiety." (AR 180-  
23 81.) She also again indicated that plaintiff's cognitive limitations, including a marked limitation  
24 in his ability to perform routine tasks, were *not* most likely the result of alcohol abuse. (AR 181.)  
25 In this evaluation, Dr. Yuodelis-Flores noted a "marked decrease" in plaintiff's alcohol and  
26 marijuana use, and estimated plaintiff's length of impairment to last a minimum of twelve months

01 and a maximum of over two years. (AR 182.)

02       Given the above, it does not appear that the ALJ accepted the opinions of Dr. Yuodelis-  
03 Flores in their entirety. Instead, the ALJ appeared to construe the treatment notes of Dr.  
04 Yuodelis-Flores to support his contention that plaintiff's substance abuse was a contributing factor  
05 material to a determination of disability. However, because her evaluations may, in fact, support  
06 the opposite conclusion, the ALJ should have directly addressed her opinions and provided  
07 adequate reasons for rejecting the opinions to the extent they differed with the ALJ's conclusions.  
08 The omission of any direct discussion of the opinions of Dr. Yuodelis-Flores is particularly  
09 inappropriate given her status as a treating physician. Accordingly, the ALJ should address the  
10 opinions of Dr. Yuodelis-Flores on remand.

11                                   Opinions of Other Sources

12       The ALJ may accord the opinions of "other sources," such as nurse practitioners, less  
13 weight than opinions from "acceptable medical sources," such as physicians and licensed  
14 psychologists. *See Gomez v. Chater*, 74 F.3d 967, 970-71 (9th Cir. 1996) (citing 20 C.F.R. §§  
15 404.1513, 416.913, 404.1527 and 416.927)). The opinions of other sources are given the weight  
16 of lay evidence. The Ninth Circuit has held that "lay testimony as to a claimant's symptoms is  
17 competent evidence that an ALJ must take into account, unless he or she expressly determines to  
18 disregard such testimony and gives reasons germane to each witness for doing so." *Lewis v. Apfel*,  
19 236 F.3d 503, 511 (9th Cir. 2001).

20       As noted above, plaintiff asserts that the ALJ improperly ignored statements from other  
21 sources, including Keith Johannes, MSW, Duane Darlington, MHP, and Erma McNare, plaintiff's  
22 girlfriend. The Commissioner argues that the ALJ properly considered the opinions of these  
23 individuals, noting, *inter alia*, the ALJ's statement that he gave "careful consideration to all the  
24 evidence." (AR 17.) The Commissioner asserts that the ALJ accepted Johannes' opinion and  
25 found marked limitations with the effects of substance abuse. (*See* AR 19, 296, 298.) She notes  
26 the ALJ's citation to Exhibit 13, which contained the evaluations of Johannes and Dr. Yuodelis-

01 Flores, and asserts that these evaluations were consistent. The Commissioner describes the  
02 opinions of Darlington and McNare as reflective of time periods in which plaintiff abused  
03 marijuana and alcohol on a daily basis. (*See* AR 273-76 and 107-11 respectively.) She further  
04 asserts that, because of their similarity to the opinions of Dr. Yuodelis-Flores, it was not necessary  
05 for the ALJ to discuss the opinions of Darlington and McNare.

06 As with Dr. Yuodelis-Flores, the ALJ's decision contains no reference to Johannes,  
07 Darlington, or McNare.<sup>3</sup> It is similarly not at all clear that the ALJ accepted the opinions of these  
08 individuals. For example, the evaluation from Johannes, like that of Dr. Yuodelis-Flores, appears  
09 to conflict, at least in part, with the ALJ's conclusion that plaintiff's impairments were disabling  
10 only with consideration of his substance abuse. (*See* AR 297-98 (Johannes' May 2003 evaluation  
11 states: "Client continued to present with symptoms of depression while incarcerated. Symptoms  
12 of depression continued during 6 months of abstinence."; "Abstinence would present a 'cleaner'  
13 picture of clients depression [sic] and result in more effective treatment."; and "Drug/alcohol use  
14 may exacerbate or mirror symptoms of anxiety and depression. Drug/alcohol use severely impairs  
15 effectiveness of treatment."; the evaluation also indicates that plaintiff's limitations, including a  
16 marked limitation in his ability to perform routine tasks, do *not* most likely result from alcohol or  
17 drug abuse.)) Moreover, although the Commissioner may accurately note that the opinions of  
18 Darlington and McNare reflect a time period in which plaintiff was engaged in substance abuse,  
19 the ALJ's decision fails to make this point. *See Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir.  
20 2003) (district court cannot rely on evidence the ALJ did not discuss).

21 Additionally, the Commissioner's reliance on case law cited appears misplaced. The  
22 Commissioner cites to *Vincent ex rel. Vincent v. Heckler*, 739 F.2d 1393, 1395-96 (9th Cir. 1984),  
23 for the proposition that the ALJ may properly exclude lay evidence conflicting with the available  
24 medical evidence, and must explain why "significant probative evidence has been rejected[.]"

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26 <sup>3</sup> The ALJ's sole citation to Exhibit 13 merely supports the statement that plaintiff sought  
mental health treatment in April 2003 following his incarceration. (*See* AR 18.)



01 rather than discuss all of the evidence. Yet, as noted in *Van Nguyen v. Chater*, 100 F.3d 1462,  
02 1467 (9th Cir. 1996), the lay witnesses in *Vincent* offered diagnoses, which was not considered  
03 competent evidence, whereas lay testimony as to symptoms and how they affect an individual's  
04 ability to work is competent evidence and may not be disregarded without comment. The decision  
05 in *Day v. Weinberger*, 522 F.2d 1154, 1156 (9th Cir. 1975), which the ALJ cites in support of the  
06 contention that lay opinions similar to accepted medical opinions need not be addressed, does not  
07 involve or address the consideration to be given lay opinions. Moreover, the Commissioner's  
08 attempt to factually distinguish various cases concerning the treatment of lay witness testimony  
09 does not alter the requirement that lay testimony be taken into account unless the ALJ "expressly  
10 determines to disregard such testimony and gives reasons germane to each witness for doing so."  
11 *Lewis*, 236 F.3d 511.

12 Here, to the extent the ALJ rejected the lay witness testimony, even in part, he failed to  
13 provide specific germane reasons for doing so. As such, the ALJ should address the opinions of  
14 Johannes, Darlington, and McNare on remand.

#### 15 Credibility Assessment

16 Absent evidence of malingering, an ALJ must provide clear and convincing reasons to  
17 reject a claimant's testimony. *See Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001); *see*  
18 *also Thomas v. Barnhart*, 278 F.3d 947, 958-59 (9th Cir. 2002). In finding a social security  
19 claimant's testimony unreliable, an ALJ must render a credibility determination with sufficiently  
20 specific findings, supported by substantial evidence. "General findings are insufficient; rather, the  
21 ALJ must identify what testimony is not credible and what evidence undermines the claimant's  
22 complaints." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996). "In weighing a claimant's  
23 credibility, the ALJ may consider his reputation for truthfulness, inconsistencies either in his  
24 testimony or between his testimony and his conduct, his daily activities, his work record, and  
25 testimony from physicians and third parties concerning the nature, severity, and effect of the  
26 symptoms of which he complains." *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir.

01 1997).

02 In considering plaintiff's credibility, the ALJ found as follows:

03 The claimant's statements concerning his impairments and their impact on his ability  
04 to work are not entirely credible.

05 While I do not doubt that the claimant has both physical and mental residuals from the  
06 stabbing, I do not find him credible regarding his inability to perform work activity.  
07 The claimant seems to primarily assert that he is unable to work due to his inability  
08 to be around "black" people. He reports that it was a black man that stabbed him.  
09 The claimant, however, has been able to live on the street prior to his recent remission  
10 from substance abuse. He also was incarcerated for several months during the time  
11 at issue. He actively seeks medical care and treatment. All of these events and  
12 activities would undoubtedly include the presence of and contact with people of  
13 varying ethnic origin, including "black" people. Furthermore, I see very little  
14 assertions of this particular problem in the record.

15 For these reasons, I do not find the claimant entirely credible.

16 (AR 20.)

17 Plaintiff notes that the situations relied on by the ALJ in support of the contention that he  
18 necessarily encountered and interacted with African American people were all forced upon him,  
19 including homelessness, incarceration, and medical care. He points to his testimony as to the  
20 difficulties he has as a result of interactions with African American people, including his inability  
21 to stay in shelters while he was homeless as a result of this fear. (AR 370-72.) Plaintiff also  
22 rejects the ALJ's determination that there was little support for this fear in the record, pointing to  
23 references in treatment notes and McNare's statement. ( See, e.g., AR 274 (intake form by  
24 Darlington noting plaintiff refused to stay in shelter and stating he "reports dislike of African-  
25 Americans.") and 107-11 (McNare stated plaintiff had "high anxiety/fear of [black] people [due]  
26 to stabbing.") Plaintiff also notes the testimony of the medical expert, Dr. Richard Johnson, that  
his unreasonable fear of African-American people is an expected symptom of his trauma. (AR  
388.)

27 The Commissioner argues that the ALJ gave clear and convincing reasons to partially  
28 reject plaintiff's testimony as to a total disability from all work. Some of the arguments provided,  
29 such as the inconsistency between plaintiff's assertions as to a "dislike of" and anxiety around

01 African-Americans, were not asserted by the ALJ and, as such, may not be relied upon by this  
02 Court. *See Connett*, 340 F.3d at 874. Nonetheless, while arguably underestimating the evidence  
03 of plaintiff's purported fear, the ALJ's credibility assessment was sufficient. The ALJ  
04 appropriately points to evidence contradicting plaintiff's asserted inability to be around African-  
05 American individuals. The undersigned finds this a rational interpretation of the evidence. *See*  
06 *Thomas*, 278 F.3d at 954. Additionally, as noted by the Commissioner, the ALJ did include a  
07 limitation on plaintiff's contact with the public and co-workers in the RFC. (AR 20.) For these  
08 reasons, the ALJ's credibility assessment does not require further consideration.

09 RFC Assessment and Hypothetical to Vocational Expert

10 Plaintiff argues that the ALJ's RFC assessment and the hypothetical proffered to the  
11 vocational expert fail to take into consideration the limitations identified by Dr. Yuodelis-Flores,  
12 the opinions of Johannes, Darlington, and McNare, as well as plaintiff's own testimony. The  
13 Commissioner asserts that the ALJ appropriately included all limitations supported by the evidence  
14 in assessing plaintiff's RFC and in proffering a hypothetical to the vocational expert, and properly  
15 relied on the opinions of Dr. Yuodelis-Flores in performing these functions.

16 The ALJ found plaintiff capable of performing "at least light exertion work activity." (AR  
17 20.) In so doing, he pointed specifically to the opinion of plaintiff's treating physician, Dr. Matt  
18 Martin, who indicated a light limitation, to last for an estimated four months, following plaintiff's  
19 treatment for the stabbing. (AR 20, 304-05.) The ALJ further found plaintiff's capacity for light  
20 work "diminished by significant non-exertional limitations[.]" and limited him to "simple and  
21 routine tasks" with "limited contact with the public and with co-workers." (AR 20.) The  
22 hypothetical proffered to the vocational expert reflected this RFC. (AR 21, 390-91.)

23 The ALJ's failure to properly assess the opinions of both Dr. Yuodelis-Flores and the lay  
24 witnesses necessarily implicates the RFC assessment and hypothetical to the vocational expert.  
25 That is, until the ALJ provides sufficient reasons for rejecting the aspects of these opinions which  
26 conflict with his conclusions, it cannot be said that the RFC assessment and hypothetical accurately

01 reflect plaintiff's limitations. Therefore, the ALJ should reassess plaintiff's RFC and modify the  
02 hypothetical to the vocational expert, as necessary, upon remand.

03 Remanding for Further Proceedings or for an Award of Benefits

04 The Court has discretion to remand for further proceedings or to award benefits. *See*  
05 *Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990). The Court may direct an award of benefits  
06 where "the record has been fully developed and further administrative proceedings would serve  
07 no useful purpose." *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002).

08 Such a circumstance arises when: (1) the ALJ has failed to provide legally sufficient  
09 reasons for rejecting the claimant's evidence; (2) there are no outstanding issues that  
10 must be resolved before a determination of disability can be made; and (3) it is clear  
from the record that the ALJ would be required to find the claimant disabled if he  
considered the claimant's evidence.

11 *Id.* at 1076-77.

12 In this case, it is not clear the ALJ would be required to find plaintiff disabled based on the  
13 record. As such, this matter should be remanded for further administrative proceedings.

14 CONCLUSION

15 For the reasons described above, this matter should be remanded for further administrative  
16 proceedings. A proposed Order accompanies this Report and Recommendation.

17 DATED this 26th day of August, 2005.

18 

19 Mary Alice Theiler  
20 United States Magistrate Judge